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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 LORI K.,

11 Plaintiff,

12 v.

13 COMMISSIONER OF SOCIAL  
14 SECURITY,

15 Defendant.

CASE NO. 3:19-CV-5233-DWC

ORDER AFFIRMING  
DEFENDANT'S DECISION TO  
DENY BENEFITS

16 Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of  
17 Defendant's denial of Plaintiff's application for a period of disability and disability insurance  
18 benefits ("DIB"). Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local  
19 Rule MJR 13, the parties have consented to have this matter heard by the undersigned  
20 Magistrate Judge. *See* Dkt. 2.

21 After considering the record, the Court concludes the Administrative Law Judge ("ALJ")  
22 did not commit harmful error at Step Two of the sequential evaluation process regarding  
23 Plaintiff's headaches. The Court also concludes the ALJ did not err in his consideration of  
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1 Plaintiff's subjective symptom testimony and in forming Plaintiff's residual functional capacity  
2 ("RFC"). As the ALJ's decision finding Plaintiff not disabled is supported by substantial  
3 evidence, the Commissioner's decision is affirmed pursuant to sentence four of 42 U.S.C. §  
4 405(g).

### 5 FACTUAL AND PROCEDURAL HISTORY

6 On January 25, 2016, Plaintiff filed an application for DIB, alleging disability as of  
7 October 15, 2015, through the date last insured, June 30, 2016. *See* Dkt. 11, Administrative  
8 Record ("AR") 17. The application was denied upon initial administrative review and on  
9 reconsideration. *See* AR 17. A hearing was held before ALJ Vadim Mozyrsky on October 19,  
10 2017. *See* AR 25. At the hearing, Plaintiff amended her alleged disability onset date to December  
11 22, 2015. AR 25. In a decision dated January 30, 2018, the ALJ determined Plaintiff to be not  
12 disabled. *See* AR 17. Plaintiff's request for review of the ALJ's decision was denied by the  
13 Appeals Council, making the ALJ's decision the final decision of the Commissioner. *See* AR 15;  
14 20 C.F.R. § 404.981, § 416.1481.

15 In the Opening Brief, Plaintiff maintains the ALJ erred by improperly: (1) evaluating  
16 Plaintiff's migraine headaches under Steps Two through Five of the sequential evaluation  
17 process; (2) evaluating Plaintiff's subjective symptom testimony; and (3) determining Plaintiff's  
18 RFC. Dkt. 15.

### 19 STANDARD OF REVIEW

20 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
21 social security benefits if the ALJ's findings are based on legal error or not supported by  
22 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th  
23 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

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**I. Whether the ALJ erred by finding Plaintiff's headaches were not a severe impairment at Step Two.**

Plaintiff contends the ALJ erred in his analysis at Step Two that Plaintiff's headaches were not severe. Dkt. 15, pp. 4-6.

### A. Legal Standard

Step Two of the administration’s evaluation process requires the ALJ to determine whether the claimant “has a medically severe impairment or combination of impairments.” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (citation omitted); 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii) (1996). An impairment is “not severe” if it does not “significantly limit” the ability to conduct basic work activities. 20 C.F.R. §§ 404.1521(a), 416.921(a). “Basic work activities are ‘abilities and aptitudes necessary to do most jobs, including, for example, walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling.’” *Smolen*, 80 F.3d at 1290 (*quoting* 20 C.F.R. §140.1521(b)). “An impairment or combination of impairments can be found ‘not severe’ only if the evidence establishes a slight abnormality having ‘no more than a minimal effect on an individual[’]s ability to work.’” *Id.* (*quoting Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988) (*adopting* Social Security Ruling (“SSR”) 85-28)).

### B. ALJ's Findings

At Step Two, the ALJ found Plaintiff's headaches were not a severe impairment. AR 20. The ALJ stated:

With respect to her migraines, the claimant took propranolol and Imitrex, but did not appear to experience any treatment or complications from this condition during the relevant period, as the record simply indicates that she took medication to manage her headaches.

1 AR 20 (citations omitted).

2 The ALJ found Plaintiff's migraines to be not severe because the record "simply  
3 indicates that she took medication to manage her headaches." AR 20. Plaintiff argues her  
4 headaches should have been considered a severe impairment, and points to evidence in the  
5 record showing she frequently complained of severe headaches. Dkt. 15, pp. 4-6. Plaintiff  
6 testified that she gets headaches every day and experiences light and sound sensitivity, which  
7 require her to lay down. AR 44. She also reported nausea caused by her headaches. AR 44.  
8 Plaintiff reported getting headaches and hearing pulsation, and that when she gets headaches,  
9 "[w]hen it rains feels like her head is being rattled with bullets." AR 325.

10 Plaintiff has not shown and the Court cannot identify any evidence in the record showing  
11 her headaches significantly limit her ability to conduct basic work activities. *See* Dkt. 15, pp. 4-  
12 6; 20 C.F.R. §§ 404.1521, 416.921 (an impairment is "not severe if it does not significant limit  
13 your physical . . . ability to do basic work activities," such as "walking, standing, [or] standing").  
14 Further, Plaintiff's assertion that the ALJ erred is vague and unclear. Plaintiff merely lists  
15 citations to the record where she complained of headaches and provides no further support or  
16 analysis. Thus, Plaintiff failed to provide any particularized argument regarding whether the ALJ  
17 erred. *See* Dkt. 15, pp. 4-6; *see also Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155,  
18 1161 n.2 (9th Cir. 2007) (citation omitted) (the court will not consider an issue that a plaintiff  
19 fails to argue "with any specificity in [her] briefing"); *Thompson v. Comm'r of Internal Review*,  
20 631 F.2d 642, 649 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981) (citation omitted)  
21 ("appellants cannot raise a new issue for the first time in their reply briefs"). Lastly, Plaintiff did  
22 not cite and the Court has not located a medical diagnosis of headaches or migraines.  
23 Accordingly, Plaintiff has failed to satisfy the requirement that a medically determinable  
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1 impairment be diagnosed by an acceptable medical source. *See* 20 C.F.R. § 404.1521. Therefore,  
2 Plaintiff has failed to show the ALJ erred at Step Two in not finding Plaintiff's headaches were  
3 severe impairments. *See Ludwig v. Astrue*, 681 F.3d 1047, 1054 (9th Cir. 2012) ("The burden is  
4 on the party claiming error to demonstrate not only the error, but also that it affected [her]  
5 'substantial rights.'").

6 **II. Whether the ALJ properly considered Plaintiff's subjective symptom**  
7 **testimony.**

8 Plaintiff contends the ALJ failed to give clear and convincing reasons for rejecting  
9 Plaintiff's testimony about her symptoms and limitations. Dkt. 15, pp. 6-9.

10 To reject a claimant's subjective complaints, the ALJ must provide "specific, cogent  
11 reasons for the disbelief." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996) (citation omitted).  
12 The ALJ "must identify what testimony is not credible and what evidence undermines the  
13 claimant's complaints." *Id.*; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Unless  
14 affirmative evidence shows the claimant is malingering, the ALJ's reasons for rejecting the  
15 claimant's testimony must be "clear and convincing." *Lester*, 81 F.2d at 834. Questions of  
16 credibility are solely within the control of the ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th  
17 Cir. 1982). The Court should not "second-guess" this credibility determination. *Allen v. Heckler*,  
18 749 F.2d 577, 580 (9th Cir. 1984). In addition, the Court may not reverse a credibility  
19 determination where that determination is based on contradictory or ambiguous evidence. *Id.* at  
20 579.<sup>1</sup>

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22 <sup>1</sup> On March 28, 2016, the Social Security Administration changed the way it analyzes a claimant's  
23 subjective symptom testimony. *See* SSR 16-3p, 2016 WL 1119029 (Mar. 16, 2016); 2016 WL 1237954 (Mar. 24,  
24 2016). The term "credibility" is no longer used. 2016 WL 1119029, at \*1. Further, symptom evaluation is no longer  
an examination of a claimant's character. *See id.* at \*10 ("adjudicators will not assess an individual's overall  
character or truthfulness"). However, the applicable Ninth Circuit case law still refers to the term "credibility." *See*  
*Trevizo v. Berryhill*, 871 F.3d 664, 678 n.5 (9th Cir. 2017) (noting SSR 16-3p is consistent with existing Ninth  
Circuit precedent). Thus, the Court will use "credibility" and "subjective symptom testimony" interchangeably.

1 Plaintiff alleges limitations resulting from both physical and mental impairments. AR 23-  
2 25. Plaintiff testified that pain from various physical conditions keeps her from working. AR 39.  
3 She testified the pain she feels is in her neck and spine, which goes down into her shoulders and  
4 lower extremities. AR 39. Plaintiff walks with a walker. AR 39-40. Plaintiff testified she can  
5 walk using her walker for about two blocks before needing to rest for 20 minutes. AR 40-41.  
6 Plaintiff testified that it hurts to stand and that she needs to sit down and rest after standing for 10  
7 minutes. AR 41. Plaintiff reported having headaches every day and says she needs to avoid light  
8 and sound when she gets them. AR 43-44. Plaintiff struggles with personal care and doesn't  
9 maintain typical hygiene due to her pain. AR 195. Plaintiff does not cook or perform any  
10 household chores and drives for short periods only when necessary. AR 196-201. Plaintiff has to  
11 read instructions multiple times and leaves any decision-making to her husband. AR 199-203.  
12 Plaintiff testified her mental health also affects her ability to work because she gets forgetful, has  
13 anxiety issues, and gets nervous around people and crowds. AR 39. She has a history of panic  
14 attacks and reported she does not socialize with friends. *See* AR 23-24, 294. She reported that  
15 medication is effective in treating her anxiety. AR 24-25. Plaintiff reported flashbacks from her  
16 son's death which triggers anxiety-related symptoms. AR 405, 431, 439.

17 The ALJ found Plaintiff's "medically determinable impairments could reasonably be  
18 expected to cause the above-alleged symptoms; however, the claimant's statements concerning the  
19 intensity, persistence and limiting effects of these symptoms are not entirely consistent with the  
20 medical evidence and other evidence in the record[.]" AR 25. First, the ALJ discussed Plaintiff's  
21 testimony regarding her physical impairments. Second, the ALJ discussed Plaintiff's testimony  
22 regarding her mental impairments.  
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1       A. Physical Impairments

2       The ALJ discounted Plaintiff's testimony regarding her physical impairments for three  
3 reasons: (1) because Plaintiff's chronic obstructive pulmonary disease ("COPD") was diagnosed  
4 after the date last insured, Plaintiff showed normal breathing after the diagnosis, and any  
5 respiratory complications were accounted for in the RFC; (2) because Plaintiff's fibromyalgia and  
6 degenerative disc disease were both described as "stable" at the time of Plaintiff's abnormal  
7 echocardiogram; and (3) because Plaintiff's injury on a roller coaster occurred after the date last  
8 insured. AR 24.

9               1. COPD

10       First, the ALJ discounted Plaintiff's testimony regarding her physical impairments because  
11 examinations noted Plaintiff "has normal breath sounds and her breathing is unlabored" after being  
12 diagnosed with COPD. AR 24. The ALJ concluded that even if Plaintiff did have respiratory  
13 problems before her COPD diagnosis, the RFC sufficiently accounts for any respiratory  
14 complications Plaintiff may have. AR 24. On December 5, 2015 (just prior to the disability  
15 onset date of December 22, 2015), after experiencing chest pain with exertion, Plaintiff had an  
16 echocardiogram which showed abnormal results. AR 276. She was later diagnosed with COPD  
17 on May 3, 2017, more than a year after the date last insured. AR 679. The ALJ noted since the  
18 COPD diagnosis, Plaintiff has normal breath sounds and her breathing is unlabored. AR 24.  
19 The ALJ concluded that while Plaintiff likely had some respiratory symptoms and limitations  
20 prior to the date last insured, "the RFC's limitation to not even moderate exposure extreme  
21 [sic] cold or atmospheric irritants sufficiently accounts for any such complications." AR 24.  
22 ALJs must consider treatment records outside the disability period because that evidence can be  
23 relevant to a claim of disability. *Jenkins v. Astrue*, 2013 U.S. Dist. LEXIS 36417 at \*17-\*18 (D.  
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1 Idaho 2013) (unpublished opinion); *Burks–Marshall v. Shalala*, 7 F.3d 1346, 1348 n. 6 (8th Cir.  
2 1993). Further, an ALJ may consider improvement in a claimant’s health as evidence of  
3 persistence and intensity of symptoms. *Moungchanh v. Colvin*, 2015 WL 4494999, \*5 (W.D.  
4 Wash. July 23, 2015).

5 Here, Plaintiff’s diagnosis of COPD in 2017 is relevant to the disability determination  
6 because Plaintiff may have been suffering symptoms of COPD during the relevant period.  
7 Moreover, the examinations in 2017 showing Plaintiff has normal breath sounds and her  
8 breathing is unlabored may be relevant evidence in determining the persistence and intensity of  
9 Plaintiff’s symptoms during the relevant period. The issue before the ALJ was limited, however,  
10 to a confined period of alleged disability—December 22, 2015 through June 30, 2016. Thus, the  
11 significance of her improved respiratory symptoms is limited as the examinations showing  
12 Plaintiff’s improvement after the date last insured does not indicate Plaintiff was not suffering  
13 symptoms of COPD during the relevant period. Therefore, the ALJ’s assertion that Plaintiff’s  
14 testimony is inconsistent with the medical evidence because Plaintiff showed normal breathing  
15 since her diagnosis of COPD is not a legitimate reason for discounting Plaintiff’s testimony.

16 However, Plaintiff has not shown that the ALJ limiting her to not even moderate  
17 exposure to extreme cold or atmospheric irritants does not account for any potential respiratory  
18 conditions Plaintiff had during the relevant period. Therefore, the Court agrees that limiting  
19 Plaintiff to light work and to not even moderate exposure to extreme cold or atmospheric  
20 irritants sufficiently accommodated any respiratory issues Plaintiff experienced during the  
21 relevant period. Accordingly, any error the ALJ committed here was harmless. *See Stout v.*  
22 *Comm’r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006) (an error is harmless when it is  
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1 not prejudicial to the claimant or “inconsequential” to the ALJ’s “ultimate nondisability  
2 determination.”).

3                   2. Fibromyalgia and degenerative disc disease

4           Next, the ALJ determined Plaintiff’s testimony was inconsistent with the medical  
5 evidence in the record because Plaintiff’s fibromyalgia and degenerative disc disease were  
6 described as “stable” at the time of Plaintiff’s abnormal echocardiogram. The ALJ provided  
7 three reasons in support. AR 24.

8           First, the ALJ pointed to several places in the record to illustrate Plaintiff’s complaints  
9 of pain were overly intense when compared to objective medical findings. *See* AR 24. For  
10 example, the ALJ referenced testing done in October 2016 which revealed minimal scoliosis  
11 through the lumbar spine, with no spondylosis or spondylolisthesis, and mild degenerative  
12 changes. AR 24, 448. The ALJ noted that a cervical spine MRI revealed disc protrusion with  
13 moderate thecal sac compression and moderate spinal canal stenosis and neural foraminal  
14 stenosis, with the remaining levels of her cervical spine unremarkable. AR 446-447. The ALJ  
15 contrasted these “relatively typical imaging results” with Plaintiff’s claims of “widespread  
16 neurological-type pain and joint stiffness/pain” and her reports of “not changing or showering  
17 often due to the pain associated with these activities.” AR 24. The ALJ reasoned that the  
18 imaging results were inconsistent with Plaintiff’s complaints because “examinations reveal[ed]  
19 intact strength and sensation throughout her extremities.” AR 24.

20           While the ALJ may correctly note that Plaintiff’s testing yielded “relatively typical”  
21 imaging results, fibromyalgia is a disease notable for its lack of usual outward signs. *See*  
22 *Benecke v. Barnhart*, 379 F.3d 587, 590 (9th Cir. 2004); *Green-Younger v. Barnhart*, 335 F.3d  
23 99, 108 (9th Cir. 2003). Social Security Administration rulings recognize that in fibromyalgia  
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1 cases, “the symptoms of [fibromyalgia] can wax and wane so that a person may have ‘bad days  
2 and good days.’” SSR 12-2P, 2012 WL 3104869, at \*6. Here, the ALJ failed to consider that the  
3 tests which he cited yielding relatively typical imaging results could have occurred on Plaintiff’s  
4 “good days.” Because the ALJ did not address whether it was possible that Plaintiff still suffers  
5 from fibromyalgia but manifests no outward symptoms, this was not a specific, clear, and  
6 convincing reason to discount Plaintiff’s testimony regarding the severity of her pain.

7         Second, the ALJ discounted Plaintiff’s testimony regarding her inability to stand for more  
8 than 10 minutes at one time because it is inconsistent with Plaintiff’s own report that she is able  
9 to jog in place for 15-30 minutes. AR 24. An ALJ may discount a claimant’s testimony if the  
10 testimony is internally inconsistent. *Koehler v. Astrue*, 283 F.App’x. 443, 445 (9th Cir. 2008); *see*  
11 *also Smolen*, 80 F.3d at 1284 (ALJs may consider “prior inconsistent statements concerning the  
12 symptoms” when determining whether a claimant’s testimony regarding the severity of her  
13 symptoms is credible). Here, Plaintiff testified at the hearing that she is unable to stand longer  
14 than 10 minutes. AR 41. By contrast, Plaintiff reported she was exercising more often by jogging  
15 in place for 15-30 minutes three times a week. AR 315, 333, 361, 397. This contradicts what  
16 Plaintiff reported at the hearing. *See* AR 397. Accordingly, the ALJ’s second reason for  
17 discounting Plaintiff’s testimony regarding the severity of her pain is specific, clear, and  
18 convincing.

19         While the ALJ provided other reasons to discount Plaintiff’s testimony regarding her  
20 physical impairments, the Court declines to consider whether these remaining reasons contained  
21 error, as any error would be harmless because the ALJ gave a specific, clear, and convincing  
22 reason to discount Plaintiff’s testimony regarding her physical impairments. *See* AR 33-34; *see*  
23 *Molina*, 674 F.3d at 1115 (because “the ALJ provided one or more invalid reasons for  
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1 disbelieving [the Plaintiff's] testimony, but also provided valid reasons that were supported by  
2 the record," the error is harmless). Accordingly, the Court finds the ALJ properly discounted  
3 Plaintiff's testimony regarding her physical impairments.

4 B. Mental Impairments

5 The ALJ discounted Plaintiff's testimony regarding her mental impairments. *See* AR 25.  
6 First, the ALJ discussed Plaintiff's testimony regarding her anxiety and panic attacks and  
7 dismissed it because Plaintiff reported that her medication was "very effective for [treating] her  
8 panic attacks." AR 24-25. Second, the ALJ discussed Plaintiff's testimony regarding anxiety-  
9 related symptoms and irritability due to flashbacks of her son's death and dismissed it because  
10 her mental status examination ("MSE"), "while noting a depressed mood, poor recent memory,  
11 and distractibility, showed normal thought content, flow of thought, and perception, fair insight  
12 and judgment, appropriate affect and behavior, and normal orientation and speech." AR 25, 402.  
13 Third, the ALJ dismissed Plaintiff's testimony regarding her mental health more generally  
14 because Plaintiff's "mental health symptoms tended to worsen in response to increased physical  
15 pain, rather than as a separate mental health issue." AR 25.

16 First, the ALJ discounted Plaintiff's testimony regarding her panic attacks and anxiety  
17 because they are effectively managed by medication. AR 24-25. "An ALJ may properly rely on  
18 the fact that medication is helpful to discount a claimant's credibility." *Wilson v. Colvin*, 2013  
19 WL 4040122, at \*7 (C.D. Cal. Aug. 8, 2013). Here, Plaintiff reported that her medication was  
20 "very effective" in treating her panic attacks. AR 323. After a clinical visit, PA-C Bryan Whetton  
21 opined Plaintiff's anxiety is "well-controlled." AR 280. The ALJ relied on the fact that Plaintiff's  
22 medication is helpful in addressing her panic attacks and anxiety. Thus, the ALJ's reason for  
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1 discounting Plaintiff's testimony regarding her mental impairments is specific, clear, and  
2 convincing.

3 While the ALJ provided other reasons to discount Plaintiff's testimony regarding her  
4 mental impairments, the Court declines to consider whether these remaining reasons contained  
5 error, as any error would be harmless because the ALJ gave a specific, clear, and convincing  
6 reason to discount Plaintiff's testimony. *See* AR 33-34; *Molina*, 674 F.3d at 1115. Accordingly,  
7 the Court finds the ALJ properly discounted Plaintiff's testimony regarding her mental  
8 impairments.

9 **III. Whether the ALJ met his burden at Step Five.**

10 Plaintiff alleges the ALJ erred at Step Five by failing to consider that Plaintiff would be  
11 off task more than one quarter of the work day, or be absent, leave early, or arrive late. Dkt. 15,  
12 p. 9.

13 The ALJ is not required to include unsupported limitations in the RFC. Plaintiff has not  
14 shown that the additional limitations are supported by credible evidence in the record. *See*  
15 Section II, *supra*. Therefore, Plaintiff's argument fails. Thus, the Court finds the RFC  
16 assessment and the hypothetical question posed to the vocational expert ("VE") were properly  
17 based on the credible functional limitations contained in the record, and thus both the RFC  
18 assessment and the hypothetical question posed to the VE were proper. *See Stubbs-Danielson*  
19 *v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008) (an ALJ's RFC assessment only needs to  
20 incorporate credible limitations supported by substantial evidence in the record); *Greger v.*  
21 *Barnhart*, 464 F.3d 968, 973 (9th Cir. 2006) (the ALJ "is free to accept or reject restrictions in  
22 a hypothetical question that are not supported by substantial evidence"). Accordingly, the ALJ  
23 did not err at Step 5.  
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1 CONCLUSION

2 Based on the foregoing reasons, the Court hereby finds the ALJ properly concluded  
3 Plaintiff was not disabled. Accordingly, Defendant's decision to deny benefits is affirmed  
4 pursuant to sentence four of 42 U.S.C. § 405(g).

5 Dated this 26th day of February, 2020.

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9 David W. Christel  
10 United States Magistrate Judge  
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